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Mr. William F. Caton
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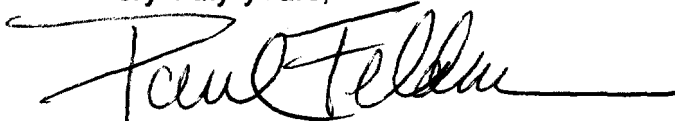
Re: IB Docket No. 95-168 & PP Docket No. 93-253
In the Matter of Revision of Rules and Policies
for the Direct Broadcast Satellite Service

Dear Mr. Caton:

Transmitted herewith, on behalf of United States Satellite Broadcasting Company, Inc., is an original and four copies of its Comments in response to the Commission's October 30, 1995 Notice of Proposed Rulemaking in the above-referenced dockets.

Should there be any questions regarding this matter, please contact me.

Very truly yours,



Paul J. Feldman
Counsel for United States Satellite
Broadcasting Company, Inc.

pf:ik
Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
Revision of Rules and Policies)
for the Direct Broadcast)
Satellite Service)

IB Docket No. 95-168
PP Docket No. 93-253

COMMENTS OF UNITED STATES
SATELLITE BROADCASTING COMPANY, INC.

FLETCHER, HEALD, & HILDRETH, P.L.C.
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November 20, 1995

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SUMMARY

USSB agrees with the Commission that the direct broadcast satellite ("DBS") industry has matured to a level to justify updating the current interim service rules. The rule revisions discussed in these Comments should enhance the diversity and growth of the DBS service, and should strengthen DBS operators, thus making them stronger competitors in the multichannel video market.

USSB supports the Commission's proposal to provide additional flexibility to DBS operations by applying the limitation on the use of DBS for "non-DBS service" to overall capacity, rather than applying the limitation to individual transponders. Such flexibility will serve the public interest by promoting technological advancement, by allowing the public to receive a variety of advanced data and information services, and most important, by allowing DBS to be a stronger competitor in the multichannel video market.

USSB believes that full and fair competition in the multichannel video market will produce the greatest benefits for American consumers, in the form of diverse and affordable services. Accordingly, USSB supports the Commission's proposal to extend the "*Tempo II*" conditions to DBS operations by all entities affiliated with non-DBS multichannel video programming distributors ("MVPDs"). Such conditions fairly promote competition in the multichannel video market, while allowing non-DBS MVPDs the opportunity to participate in the DBS business and provide a variety of service offerings. Similarly, because USSB

also shares the Commission's concern that concentration of DBS spectrum among DBS operators could limit competition, USSB suggests that any operator (including its affiliates or subsidiaries) that has an authorization for, or otherwise controls through leases or similar agreements, 16 or more channels at any particular eastern orbital slot, should be prohibited from holding authorizations for or operating from any other eastern orbital slots.

USSB fully supports the Commission's tentative conclusion that DBS channels need no longer be assigned only in east/west pairs. Full-CONUS service can now be provided from the eastern allotments, and western orbital facilities can most efficiently be used to provide niche services, or service to Hawaii and Alaska. While market forces should result in DBS service to those two states in the near future, if the Commission nevertheless sees the need to enact a requirement to serve Hawaii and Alaska, the fairest and most efficient approach would be to make that requirement applicable only to new permittees, and only where technically feasible from the assigned orbital location.

USSB supports the Commission's proposal to extend, from five years to ten years, the license term for non-broadcast DBS stations. Care should be taken, however, in crafting the distinction between "broadcast" and "non-broadcast" DBS facilities, and the Commission should look at the primary use of the DBS spectrum. If the majority of an operator's transponders transmit scrambled programming, then its facility should be considered "non-broadcast" and given a ten year license term.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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)	
Revision of Rules and Policies))	IB Docket No. 95-168
for the Direct Broadcast)	PP Docket No. 93-253
Satellite Service)	

**COMMENTS OF UNITED STATES
SATELLITE BROADCASTING COMPANY, INC.**

United States Satellite Broadcasting Company, Inc. ("USSB"), by its attorneys, hereby submits its Comments in response to the Commission's Notice of Proposed Rulemaking, released October 30, 1995, in the above-captioned proceeding ("Notice").

I. INTRODUCTION

USSB is one of the only two high-power direct broadcast satellite ("DBS") system licensees currently providing DBS service in the United States (DIRECTV is the other licensee). USSB is a pioneer in DBS, and it has invested substantial effort and resources to make DBS in the United States a reality. With the commencement of service in June of 1994, DBS provides, for the first time, a major nation-wide multichannel video service to compete with cable TV service. This competition will provide consumers with greater choice, innovative services, and lower prices. The DBS service of USSB and DIRECTV, which operate from the same orbital location and use the same technology, has experienced rapid growth. USSB seeks to ensure that DBS

continues to develop into a dynamic, technologically advanced, and competitive video provider.

While USSB's DBS service operates under the Commission's "interim" service rules, it has been able to achieve ready market acceptance under these rules. However, USSB agrees with the Commission that the industry has matured to a sufficient level to justify updating the present interim service rules. The service rules discussed below should enhance the diversity and growth of DBS service, and should strengthen DBS operators, thus making them stronger competitors in the multichannel video market.

II. PROPOSED SERVICE RULES

A. Use of DBS Capacity

USSB supports the Commission's proposal to provide additional flexibility to DBS operations by applying the limitation with respect to "non-DBS service" to overall capacity, rather than considering the limitation with respect to individual transponders. Notice at para. 30. Such flexibility will serve the public interest by promoting technological advancement, by allowing the public to receive a variety of advanced data and information services, and importantly, by allowing DBS to be a stronger competitor in the multichannel video market.

USSB has always considered the transmission of video programming to be the primary component of its DBS service. Nevertheless, early in the development of its DBS service, USSB recognized that DBS could provide an efficient vehicle for the transmission of data, and further enhance the value of DBS.

Accordingly, USSB sought clarification of its DBS authorization with regard to the use of DBS to provide such non-video services. In granting USSB's request,¹ the Commission reaffirmed that, while the primary use of DBS was for the provision of video services, it had from the beginning recognized the utility and public interest benefit of the DBS transmission of data services. USSB, 1 FCC Rcd at 978, citing DBS Report and Order, 90 FCC 2d 676,682 (1982). However, in order to meet concerns that DBS applicants would only transmit non-video information, thus constituting a *de facto* reallocation of the DBS spectrum, the Commission imposed limitations on non-video "ancillary" uses: DBS operators had to commence video services before the end of their five year license term, and thereafter non-video use could not exceed fifty percent of each day on any particular transponder.

The requirement to measure the use of each individual transponder for video service may have been a rational solution when adopted since DBS service was not actually then being offered to the public. However, subsequent experience has shown that the earlier concerns regarding *de facto* reallocation no longer appear to be substantial: it is obvious that there is a growing market for multichannel video programming, and the programming services of USSB and DIRECTV, as well as the announced plans of EchoStar and Primestar, demonstrate that DBS facilities are likely to be primarily used to address that

¹ See, *United States Satellite Broadcasting Company, Inc.*, 1 FCC Rcd 977 (1986) ("USSB").

market. However, as the number of DBS receivers proliferates, DBS will become a more efficient and attractive method of transmitting data, as part of the provision of information services, or the delivery of computer software services, for example. However, the current limitation on the use of individual transponders may prove to be a barrier to the efficient provision of data transmission: rather than having individual transponders as the known source of particular data services, data traffic will have to be regularly switched among different transponders.

Accordingly, USSB supports the Commission's proposal to revise its non-video transmission requirements from a limitation imposed on each transponder, to an overall capacity limitation. Giving DBS operators the flexibility to segregate their video and non-video transmissions on different transponders will allow operators to configure their systems in a manner consistent with their business plans, and with the needs and interests of their subscribers. Furthermore, capacity-based requirements allowing segregation of data and video transmission will promote efficient use of transponders, facilitate ease of use by consumers, and further the goal of spectrum efficiency.

The growth of satellite-delivered data services is an important technological advancement which in and of itself thereby further serves the public interest.² Importantly, the

² DBS operators can provide satellite-delivered data to a large number of people who cannot use C- or Ku-band facilities, due to concerns regarding the size and price of larger dishes.

availability of such services will increase the subscriber penetration of DBS services, increase the revenues of DBS operators, and make DBS operators stronger competitors in the multichannel video market, which is a major reason why the Commission has authorized DBS. See *1994 Cable Competition Report*, 9 FCC Rcd 7442, 7466 (1994), and *Tempo Satellite, Inc.*, 7 FCC Rcd 2728, 2730 (1992) ("*Tempo II*"). Indeed, the ability to transmit data and provide information services may be necessary for DBS to remain competitive with other multichannel video programming distributors ("MVPDs") such as cable TV and video dialtone operators.³

B. Pro-Competitive Rules and Policies

1. *Competition Among MVPDs*

USSB believes that full and fair competition in the MVPD market will produce the greatest benefits for American consumers, in the form of diverse and affordable services. USSB shares the Commission's concern that a DBS operator owned or controlled by a cable TV operator could not be expected to vigorously compete with its own cable systems. Notice at para. 35. See, *Tempo II*, 7 FCC Rcd at 2730 (noting TCI-controlled Tempo's plan to provide DBS service primarily to homes not subscribing to cable TV, or as

In addition, DBS service offers better interference protection between channels than is available in the C- or Ku-band.

³ See, e.g., "The New Internet Gatekeepers; Beware David, the Goliath Providers are Coming!" New York Times, November 13, 1995 at B4 (noting impending entrance of all Bell Operating Companies ("BOCs"), and cable TV operators such as TCI and Continental Cablevision, into the internet access business).

an "ancillary service" to cable subscribers). In the *Tempo II* case, the Commission granted Tempo's authorization with conditions designed to limit these anti-competitive incentives.⁴

In the three years since the *Tempo II* case, nothing has changed the underlying economic incentive that would dissuade a DBS operator affiliated with other multichannel video services (e.g., cable TV or video dialtone) from vigorously competing with its non-DBS affiliates. Accordingly, with the likely growth of DBS providers affiliated with other MVPDs,⁵ USSB supports the Commission's proposal (Notice at para. 39) to extend the *Tempo II* conditions to DBS operations by all entities affiliated with non-DBS MVPDs. Such conditions fairly promote competition in the multichannel video market, while allowing non-DBS MVPDs the opportunity to participate in the DBS business and provide a variety of service offerings.

In addition to the two conditions imposed by the Commission in *Tempo II*, the following additional conditions should be added where a DBS provider is affiliated with a non-DBS-MVPD:

1. Prohibit the tying or combining of the DBS service with the affiliated MVPD service that would result in a

⁴ Specifically, Tempo was prohibited from 1) offering its DBS service primarily as an ancillary service to subscribers of its affiliated cable systems, or 2) providing DBS service to its affiliated cable TV subscribers under terms different from those offered to non-cable subscribers. *Tempo II*, 7 FCC Rcd at 2731.

⁵ Five BOCs (Ameritech, Bell Atlantic, Bell South, Nynex and SBC Corporation) have applied for waivers of the Modified Final Judgement to allow them to enter into the DBS business. See, *Communications Daily*, October 3, 1995, at page 6. Each of these BOCs has filed applications to provide video dialtone and/or cable TV service.

discount or reduction of the fee that would be charged to a subscriber who purchased each service independently;

2. Prohibit the tying or combining in any way of programming from the DBS service with programming carried on the affiliated MVPD service into a single offering to the public; and
3. Preclude tying or combining the purchase or licensing of programming for the DBS service with the purchase or licensing of programming for the affiliated MVPD service.

2. Concentration Among DBS Operators

USSB also shares the Commission's concern regarding concentration of DBS spectrum among DBS operators. With the number of orbital positions allocated to DBS limited by international law, the day when all U.S. DBS allotments are occupied by operating systems is certainly foreseeable⁶. While advancements in signal compression technology should continue to increase total channel capacity, even such technological solutions have a limit. Accordingly, the Commission is correct in concluding that excessive channel accumulation by one or more DBS operators could limit the resources available to future DBS competitors. *Notice* at para. 41. A limit on channel capacity held by one DBS operator (and its affiliates) is appropriate. Yet, while such a limit must preserve spectrum for intra-DBS competition, it must also ensure that individual DBS operators have sufficient spectrum to offer robust competition to other

⁶ In paragraph 52, mention is made of a Commission staff study that indicates additional DBS satellites may be accommodated beyond those that can be assigned to the present eight orbital locations. Any such new assignment must not affect any operating or prior planned DBS satellite.

MVPDs.

USSB believes that the following formula provides the proper balance: any operator (including its affiliates or subsidiaries) that has an authorization for, or otherwise controls through leases or similar agreements, 16 or more channels at any particular eastern orbital slot,⁷ should be prohibited from holding authorizations for or operating from any other eastern orbital slot. The end result would be that at least four or more, full-CONUS DBS services are guaranteed. Each of these services would have sufficient program channels to provide a dynamic and competitive service. As stated at paragraph 5 of the Notice, current compression ratios of 5:1 would give each full-CONUS provider between 80 and 160 program channels with the number of program channels expected to increase as digital compression technology improves.

3. Access to Programming

The Commission states, in paragraph 57 of the Notice, that the proposed assignment of the Advanced Communications Corporation ("ACC") DBS construction permit to Tempo DBS raised concerns that Tempo, or Primestar, which would utilize the Tempo DBS capacity, could improperly gain a competitive advantage over other DBS operators by using various vertical foreclosure strategies to limit access to, or raise the price of, programming. While noting the existence of Section 628 of the Communications Act, and the program access rules derived

⁷ 119°, 110°, 101° and 61.5° W.L.

therefrom, the Commission asks whether such provisions are sufficient to prevent anti-competitive programming agreements in the DBS service, or if specific DBS program access rules are required.

As a preliminary matter, USSB continues to support the Commission's acknowledgement in its Notice that there is no need to expand the program access rules to apply to exclusive programming contracts licensing a DBS operator that does not own the programming involved, and that itself is not affiliated with a cable TV operator. Notice at para. 60. After an extensive review of the legislative record, the Commission concluded, in a separate proceeding, that in enacting Section 628, Congress was concerned with the market power abuses exercised by cable TV operators, and the history of anti-competitive programming contracts by cable-affiliated programmers.⁸ Congress did not address the practices of non-cable MVPDs, such as DBS, for the likely reason that there was no record of any such abuses.

Similarly, there does not appear to be a current need for a program access rule addressing anti-competitive program agreements involving DBS operators unaffiliated with cable TV operators. It is clear that if a DBS operator affiliated with a cable operator were to engage in anti-competitive programming practices, that Section 628 and the program access rules would be triggered, and such provisions appear to be sufficient to remedy

⁸ See, *Video Programming Distribution and Carriage, Memorandum Opinion and Order*, 10 FCC Rcd 3105, 3123 (1994).

any improper conduct. No case has yet arisen involving anti-competitive program agreements of a DBS operator affiliated with a non-cable MVPD, such as a wireless cable or video dialtone operator. If and when it appears that such a case may arise, the Commission can at that time craft any necessary rules, based on the then factual record.⁹

4. East/West Paired Assignments

USSB fully supports that Commission's tentative conclusion that DBS channels need no longer be assigned only in east/west pairs. Notice at para. 65. USSB and DIRECTV have shown in their operation from 101° W.L. that full-CONUS service can be provided solely from the eastern allotments. Accordingly, satellites operated at the four western orbital locations could be beneficially used for niche services, or for provision of service to Hawaii or Alaska. Such decisions, however, should be subject to the business judgement of a DBS operator.

C. Service to Alaska and Hawaii

USSB recognizes the Commission's intention to provide DBS service to Hawaii and Alaska. Progress in satellite technology, and market forces should lead to the provision of DBS service to Hawaii and Alaska. Thus, a DBS operator's business decisions should govern the provision of service to Alaska and Hawaii. If the Commission nevertheless sees the need to enact a requirement

⁹ In addition to remedies based on the Communications Act, aggrieved parties can also rely on federal anti-trust regulations for a remedy. See, e.g., *United States v. Primestar Partners*, 1994-1 Trade Cas. (CCH) ¶70,562 (S.D.N.Y. 1994).

to serve Hawaii and Alaska, the fairest and most efficient approach would be to make that requirement applicable only to new permittees, and only where technically feasible from the assigned eastern orbital location, as proposed in paragraph 70 of the Notice.

D. License Term

USSB supports the Commission's proposal to extend, from five years to ten years, the license term for non-broadcast DBS stations. Notice at para. 71. Such an extension is logical in light of the useful life of current satellites.¹⁰ Extended license terms will add stability to the DBS industry, and encourage further investment and innovation in DBS facilities.

Care should be taken, however, in crafting the distinction between "broadcast" and "non-broadcast" DBS facilities. In some cases, DBS operators may transmit amounts of "broadcast" programming (i.e., unscrambled to all those having receivers capable of receiving programming from the DBS satellite without a charge for that programming), although the vast majority of the operator's programming is scrambled and available only to subscribers. For example, USSB currently transmits an encrypted "barker" channel which is unscrambled to all DSS™ receivers, the receive equipment used by USSB and DIRECTV viewers, containing promotional advertisements for scrambled USSB programming. Clearly, it is not the Commission's intention that providing one

¹⁰ The useful life of the satellite currently used by USSB is predicted to range from 15.5 to 17.2 years from launch.

free channel of promotional material would convert USSB into a broadcast service. USSB also transmits encrypted religious and public service programming, which is unscrambled, to DSS™ homes and expects to increase the amount of such programming in the future. See Exhibit A, attached hereto. The voluntary transmission of encrypted public service programming, which is unscrambled without charge and which uses a limited amount of channel space, should not be used to convert a DBS service into broadcasting. The consequence of such an action, i.e., the reduction of the license term from ten to five years, would create such a substantial disincentive to DBS operators, that the result would be predictable: the deletion of even limited unscrambled DBS programming. The public interest would be harmed in two ways: DBS operators could not use free promotional material to attract new subscribers to DBS, resulting in long term negative impact on the growth of the DBS service. Second, the public would be deprived of free public interest programming.


Accordingly, in classifying DBS as broadcast or non-broadcast, the Commission should look at the DBS licensee's primary use of its overall capacity. If the majority of an operator's transponders transmit scrambled programming to subscribers, then its facility should be considered "non-broadcast" and given a ten year license term.

III. CONCLUSION

Modification to the Commission's DBS service rules, as discussed above, should enhance the diversity and growth of the

DBS service, and should strengthen DBS operators, making them stronger competitors in the multichannel video market.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul J. Feldman", written over a horizontal line.

Marvin Rosenberg
Paul J. Feldman

Counsel for United States
Satellite Broadcasting Company, Inc.

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November 20, 1995

EXHIBIT A

PUBLIC SERVICE PROGRAMMING

NOVEMBER 1994 PUBLIC SERVICE PROGRAMMING					
DATE	DAY	PROVIDER	EPISODE	PROGRAM	LENGTH
1-Nov	Wed	FACTA	SF50	Sunshine Factory: Sharing Day 1	27:09:00
		American Red Cross		HIV: Reasons to Care	34:51:00
2-Nov	Thu	FACTA	SF51	Sunshine Factory: Sharing Day 2	27:09:00
		Freedom Forum		Alan Shepard: Moon Shot	29:21:00
3-Nov	Fri	FACTA	167	Sunshine Factory: Gossip	27:15:00
		Hazelden		The Hazelden Experience	17:30:00
4-Nov	Sat	FACTA	1.9	Beyond the News: Peacemakers	27:10:00
		Freedom Forum		Judy Mann: The Difference	28:48:00
5-Nov	Sun	Reverend Shuller		Hour of Power	58:30:00
		FACTA	9412	On Main Street: The Bible/ Fact or Fiction	27:10:00
6-Nov	Mon	FACTA	52	Sunshine Factory: Sharing Day 3	27:09:00
		FACTA		Church Today: Father Andrew Greeley	29:20:00
7-Nov	Tue	FACTA	53	Sunshine Factory: Sharing Day 4	27:09:00
		Freedom Forum		Nadine Strossen: Defending Pornography	28:40:00
8-Nov	Wed	FACTA	54	Sunshine Factory: Sharing Day 5	27:09:00
		American Lung Assn.		The Coach's Final Lesson	17:48:00
9-Nov	Thu	FACTA	168	Sunshine Factory: Remembering Things	27:14:00
		Freedom Forum		Free Spirit Award: Myrlie Evers-Williams	29:23:15
10-Nov	Fri	FACTA	60	Sunshine Factory: Responsibility Day 1	27:09:00
		American Red Cross		A Letter From Brian	29:43:00
11-Nov	Sat	FACTA	1.5	Beyond the News: Homelessness	27:09:29
		Freedom Forum		Wilma Mankiller: A Chief and Her People	28:41:00
12-Nov	Sun	Reverend Shuller		Hour of Power	58:30:00
		FACTA	9501	On Main Street: Identifying Conflict	27:09:00
13-Nov	Mon	FACTA	61	Sunshine Factory: Responsibility Day 2	27:10:00
		American Cancer Soc.		Women's Cancer Issues	20:04:00
14-Nov	Tue	FACTA	62	Sunshine Factory: Responsibility Day 3	27:11:00
		Freedom Forum		Randall Rothemberg: When the Suckers Moon	28:43:15
15-Nov	Wed	FACTA	63	Sunshine Factory: Responsibility Day 4	27:10:00
		Susan G. Komen		The Promise/Breast Self-Exam	21:52:00
16-Nov	Thu	FACTA	64	Sunshine Factory: Responsibility Day 5	27:10:00
		Freedom Forum		Peter Arnett: Live From the Battlefield	28:07:00

PUBLIC SERVICE PROGRAMMING

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